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No. 93-1765

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD R. COLE,

Petitioner,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Several points raised in respondent's opposition to the petition for certiorari call for a brief reply.

1. Respondent's assertion that the third sentence of 38 U.S.C. § 7252(a) (1988) permits him to independently argue for remand (Br. in Opp. 9) is incorrect. Section 7252(a) grants the Court of Veterans Appeals (CVA) jurisdiction to review decisions of the Board of Veterans' Appeals (Board), to the extent such decisions are challenged by parties other than respondent, and sets out the

nature of the remedies available. Although the second sentence of the statute expressly forbids respondent to "seek review of any such decision" appealed to the CVA by "a person adversely affected," 38 U.S.C. § 7266(a) (1988), respondent argues that the third sentence should be read in isolation and somehow erases the second. The Court should presume that Congress does not write such internally inconsistent statutes, *Fugere v. Derwinski,* 972 F.2d 331, 336 (Fed. Cir. 1992) (citing *Markham v. Cabell,* 326 U.S. 404, 411 (1945)), and "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 112 S.Ct. 1146, 1149 (1992).

Respondent argues (Br. in Opp. 9) that the express terms of Section 7252(a) do not forbid him "from arguing on a veteran's appeal that it is appropriate to remand the case. . . ." However, that is not what respondent has done. Petitioner's appeal to the CVA raised only two issues of law and respondent did not seek remand on either of these issues. Pet. App. 83a-87a. Instead, in violation of Section 7252(a), respondent raised a new issue, i.e., inadequate reasons or bases for a factual finding,[1] and argued for remand solely on that basis. Section 7252(a) gives the type of explicit guarantee that a new trial will not occur on respondent's issues, in this case a remand for "readjudication," Pet. App. 8a, that the

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[1] Even if the Board's decision had been unclear with respect to a factual determination, the Federal Circuit has held that the interpretation of a Board decision "is unquestionably a matter of law," *Livingston v. Derwinski,* 959 F.2d 224, 226 (Fed. Cir. 1992), over which the CVA exercises plenary jurisdiction. *Machado v. Derwinski,* 928 F.2d 389, 391 (Fed. Cir. 1991). There is no set of reasons or bases which can justify a legal error in the Board's decision.

Court has found will support an immediate appeal. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (stating that "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur"). By raising a new issue before the CVA, respondent transformed petitioner's appeal into his own in violation of Section 7252(a). Section 7252(a) denies the CVA jurisdiction to remand based on respondent's assignments of error.

2. Respondent's statement that the CVA's remand order was a windfall to petitioner (Br. in Opp. 8) is incorrect. Decisions by the Board are final, 38 U.S.C. § 7104(a) (1988), unless appealed to the CVA, 38 U.S.C. §§ 7252(a), 7266(a). The law prohibits respondent from "seek[ing] review of any such decision," 38 U.S.C. § 7252(a), in addition to forbidding him from filing a notice of appeal. 38 U.S.C. § 7266(a). Board decisions are therefore absolutely final as to respondent. *Id.*; 38 U.S.C. § 7252(a). Having to endure the burden of remand proceedings, solely on respondent's request, while petitioner's properly presented appeal is ignored, is no "windfall."

Petitioner invoked the CVA's mandatory jurisdiction, 38 U.S.C. §§ 7252(a), 7266(a), to review two legal issues. Pet. App. 83a-87a. Neither was addressed. Pet. App. 8a. Rather, the CVA remanded[2] on an issue raised solely by respondent. *Id.* The remand violated a statutory right

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[2]Respondent is incorrect (Br. in Opp. 8) in stating that delay does not justify immediate appealability in this case. The delay occasioned by remand results from the deprivation of the exclusive right granted to petitioner by Congress to determine the issues before the CVA. The issue is not the length of the delay, but rather whether any delay is permissible for this illegal purpose.

conferred by Congress and not the type of private contractual right the Court has found will not support an immediate appeal. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 2004 (1994).

Respondent cites *Digital Equipment Corp.* for the proposition that collateral order review is a narrow exception to the final order rule and should stay that way. Br. in Opp. 4. Unlike 28 U.S.C. § 1291 (1982), which specifically excludes the United States Court of Appeals for the Federal Circuit, there is presently no similar "practical construction," *Digital Equipment Corp.*, 114 S.Ct. at 1995, of 38 U.S.C. § 7292 (1988), the statute at issue in this case. While Section 1291 expressly imposes a finality requirement, Section 7292 states that review is available after a decision is "entered." The CVA entered a decision when it remanded because it expressly did "not retain jurisdiction." Pet. App. 8a. If the Court finds that review is available under Section 7292 in this case, that decision need not necessarily expand collateral order review under Section 1291.

3. Respondent incorrectly asserts (Br. in Opp. 7) that it is unclear whether the CVA conclusively determined the disputed question because that court "did not rule expressly on petitioner's Section 7252(a) argument." This statement begs the question. It is indisputable that the CVA "remanded for readjudication for reasons set forth in the Secretary of Veterans Affairs' brief. . . ." Pet. App. 8a. The reasons advanced by the Secretary were exclusively that "the [Board] failed to provide adequate reasons and bases for its determination to deny Appellant's claim. . . ." Pet. App. 29a. It is also beyond dispute that petitioner argued to the CVA that respondent's urging a remand on that basis was "tantamount to the Secretary's appealing or cross-appealing the Board's

decision" in violation of Section 7252(a). Pet. App. 88a. That the CVA conclusively determined that Section 7252 does not prohibit a remand at the sole request of respondent could not be more clear, otherwise the CVA could not have remanded as it did in this case.

Respectfully submitted,

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